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ATTORNEY FOR APPELLANT:

PERRY D. SHILTS
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE

BRIDGETTE F. GREENE
Elkhart, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MICHELLE M. SHEPERD,

Appellant-Petitioner,

vs.

JAIME M. SHEPERD,

Appellee-Respondent.

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No. 20A03-0608-CV-376

APPEAL FROM THE ELKHART SUPERIOR COURT

The Honorable Stephen E. Platt, Judge

David A. Denton, Magistrate

Cause No. 20D02-0502-DR-101

May 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Michelle Sheperd (“Wife”) appeals the trial court’s grant of Jamie Sheperd’s (“Husband”) petition to modify child support. She contends that the trial court abused its discretion in determining that Husband is no longer voluntarily underemployed. Finding no abuse of discretion, we affirm the judgment of the trial court.

Facts and Procedural History

Wife and Husband married in the mid-1980s. The couple had five children. Wife was the primary source of income for the family while Husband was attending medical school and participating in a residency program between 1989 and 1997. In approximately 1997, after Husband completed his residency program, Wife stopped working and stayed at home to care for the couple’s children. In 2001, Wife filed a petition to dissolve the marriage. Husband’s income for 2001 from his employment and ownership interest with Goshen Radiology, P.C. (“Goshen Radiology”), was \$896,792.00. Husband’s 2002 income was \$754,590.00. In 2003, Husband gave up his interest in Goshen Radiology and moved to the Seattle, Washington, area, where he began working for a company called Radia. In 2004, Husband earned \$235,519.00.

On November 5, 2004, the trial court granted Wife’s petition to dissolve the marriage. The Decree of Dissolution of Marriage (“Decree”) granted legal custody of the couple’s five children to Wife. The Decree also provided:

[Husband] was employed with Goshen Radiology, P.C., until February 28, 2003, when he voluntarily left that employment, voluntarily left the Elkhart community, and voluntarily assumed an employment position with Radia Medical Imaging of Seattle, Washington. [Husband’s] income for 2001 from his employment and ownership interest with Goshen Radiology, P.C., was \$896,792.00. [Husband’s] income for 2002 from his employment and

ownership interest with Goshen Radiology, P.C. was \$754,590.00. [Husband] voluntarily left a higher paying employment position for a position which paid significantly less.

Appellant's App. p. 55. The trial court imputed to Husband an income of \$750,000.00 per year, or \$14,423.00 per week, and set Husband's weekly child support obligation at \$1523.00.

On January 7, 2005, just two months after the original Decree was entered, Husband filed a Petition to Modify Support and Visitation ("First Petition to Modify Support") and a Motion for Change of Venue from Judge. Husband claimed that his income was approximately \$250,000.00 per year. The trial court granted Husband's motion for change of judge but denied his First Petition to Modify Support.

On December 21, 2005, Husband entered into an employment agreement with Olympic Medical Physicians ("Employment Agreement"). The Employment Agreement provided for annual compensation of approximately \$330,000.00 to \$350,000.00 per year, \$1200.00 per month for health insurance for Husband and the children, a place for Husband to live in Washington, travel expenses for Husband between Washington and Indiana, and travel expenses for two visits per year to Washington by the children. The Employment Agreement also allowed Husband to work in Elkhart 70% of the time, so Husband relocated to Elkhart. The term of the Employment Agreement is January 1, 2006, through December 31, 2008.

On February 14, 2006, Husband filed another Petition to Modify Support ("Second Petition to Modify Support"), in which he alleged that there had been "material changes in circumstances that have occurred which make the current order

unreasonable.” Appellant’s App. p. 66. During the hearing on the petition, Husband testified regarding his new Employment Agreement and stated that he expected to receive another pay raise because he had recently been appointed medical director with Olympic Medical Physicians. Wife’s attorney made a request for attorney fees relating to Husband’s Second Petition to Modify Support and submitted an Attorney Fee Affidavit. After the hearing, the trial court entered an order granting Husband’s petition. The order provides, in pertinent part:

[Husband] filed his [Second Petition to Modify Support] on February 14, 2006. The evidence established that [Husband] left a job in the Goshen area in 2002 which paid an annual salary of \$754,590.00, \$142,202.00 less than his gross income in 2001. In 2005 [Husband] earned a gross salary of \$293,512.00. For 2006, [Husband] testified that he will earn between \$330,000.00 and \$350,000.00 in salary. [Husband] is also provided with transportation expenses for the children to visit Seattle, Washington and is provided free housing in Seattle when he is working in that area, but the value of the benefits was not placed in evidence. The court finds [Husband’s] gross income for 2006 is or will be \$350,000.00 and child support will be based on that income. [Husband] has worked at the reduced income for a period sufficient to allow him his request for modification.

Id. at 49-50. The order further provided: “[Husband] will continue to pay the private school expenses for the children and that sum shall be included in the calculation of child support[.]” *Id.* at 50. The trial court ordered the parties to submit a child support worksheet. After receiving the child support worksheet, the trial court entered an order reducing Husband’s child support obligation to \$1196.10 per week. The trial court also denied Wife’s request for attorney fees.¹ Wife now appeals.

Discussion and Decision

¹ The parties do not direct us to anything in the record that indicates that the trial court either granted or denied Wife’s request for attorney fees. Nonetheless, the parties agree that the trial court did deny the request.

On appeal, Wife argues that the trial court abused its discretion in granting Husband's Second Petition to Modify Support and in denying Wife's request for attorney fees.

I. Modification of Child Support

Wife first contends that the trial court abused its discretion in granting Husband's Second Petition to Modify Support. In reviewing a decision regarding a petition to modify child support, we will reverse if there is a showing that the trial court abused its discretion. *Meredith v. Meredith*, 854 N.E.2d 942, 947 (Ind. Ct. App. 2006). We consider the evidence most favorable to the judgment without reweighing the evidence or judging the credibility of the witnesses. *Id.* An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances that were before the trial court, including any reasonable inferences to be drawn therefrom. *Id.*

Generally, a child support order may only be modified:

(1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or

(2) upon a showing that:

(A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and

(B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.

Ind. Code § 31-16-8-1.

Here, Husband proceeded under subsection (1). The initial support order was based on the trial court's finding that Husband was voluntarily underemployed. *See*

Appellant's App. p. 55. Husband's Second Petition to Modify Support alleged that there had been "material changes in circumstances that have occurred which make the current order unreasonable." Appellant's App. p. 66. In effect, Husband was asking the trial court to find that he was no longer voluntarily underemployed. The trial court did so, finding, "[Husband] has worked at the reduced income for a period sufficient to allow him his request for modification." *Id.* at 50. On appeal, Wife essentially contends that the trial court abused its discretion in determining that Husband is no longer voluntarily underemployed. We cannot agree.

The Indiana Child Support Guidelines specifically acknowledge that parents often take drastic measures, such as becoming unemployed or underemployed, merely to liberate themselves from their child support obligations. *Gilpin v. Gilpin*, 664 N.E.2d 766, 767 (Ind. Ct. App. 1996); *see also* Ind. Child Support Guideline 3(A)(3). The Guidelines attempt to discourage such efforts by giving the trial court wide discretion to impute potential income to a parent when the court is convinced that the parent's unemployment or underemployment has been contrived for the sole purpose of evading support obligations. *Gilpin*, 664 N.E.2d at 767-68. However,

[w]hile some parents may become unemployed or underemployed in an attempt to relieve themselves of significant child support obligations, legitimate reasons may also exist for parents to leave employment or take a lower paying job, and child support orders are not to be used as a tool to promote a society where all work to their full economic potential or where parents are forced to base their career decisions strictly upon the size of potential paychecks.

Homsher v. Homsher, 678 N.E.2d 1159, 1164 (Ind. Ct. App. 1997).

In this case, the trial court was apparently convinced at the time of dissolution that Husband had taken a lower paying job in an effort to minimize his child support obligation. But a finding of voluntary underemployment is not permanent. *See id.* Just as a trial court has discretion to impute income to a parent in the first instance, it must have discretion to cease the imputation of income at a later date. The evidence establishes that nearly three years passed from the date on which Husband left his employment with Goshen Radiology—February 28, 2003—to the date on which Husband filed his Second Petition to Modify Support—February 14, 2006. In addition, Husband’s reduced income will continue through at least 2008 by virtue of the Employment Agreement he signed in December 2005. This evidence is sufficient to support a conclusion that Husband’s decision to leave Goshen Radiology was not, contrary to the original trial court’s finding, simply a temporary ploy meant to minimize his child support obligation. Furthermore, there is evidence that Husband’s income has risen steadily—from \$235,519.00 in 2004 to \$350,000.00 in 2006—since he left Goshen Radiology, and he testified that he had been appointed as medical director with Olympic Medical Physicians and expected another pay increase. This evidence tends to show that Husband is not actively seeking to work at a reduced income for the sole purpose of evading support obligations. *See Gilpin*, 664 N.E.2d at 767-68. Therefore, the trial court did not abuse its discretion in granting Husband’s Second Petition to Modify Support.

II. Attorney Fees

Wife also argues that the trial court abused its discretion in denying her request for attorney fees related to Husband’s Second Petition to Modify Support. She also asks us

to order Husband to pay her appellate attorney fees. However, her claims rely solely upon her argument that the trial court abused its discretion in granting Husband's Second Petition to Modify Support. Because we rejected that argument, we must also reject Wife's claims regarding attorney fees.

Affirmed.

BAILEY, J., and BARNES, J., concur.